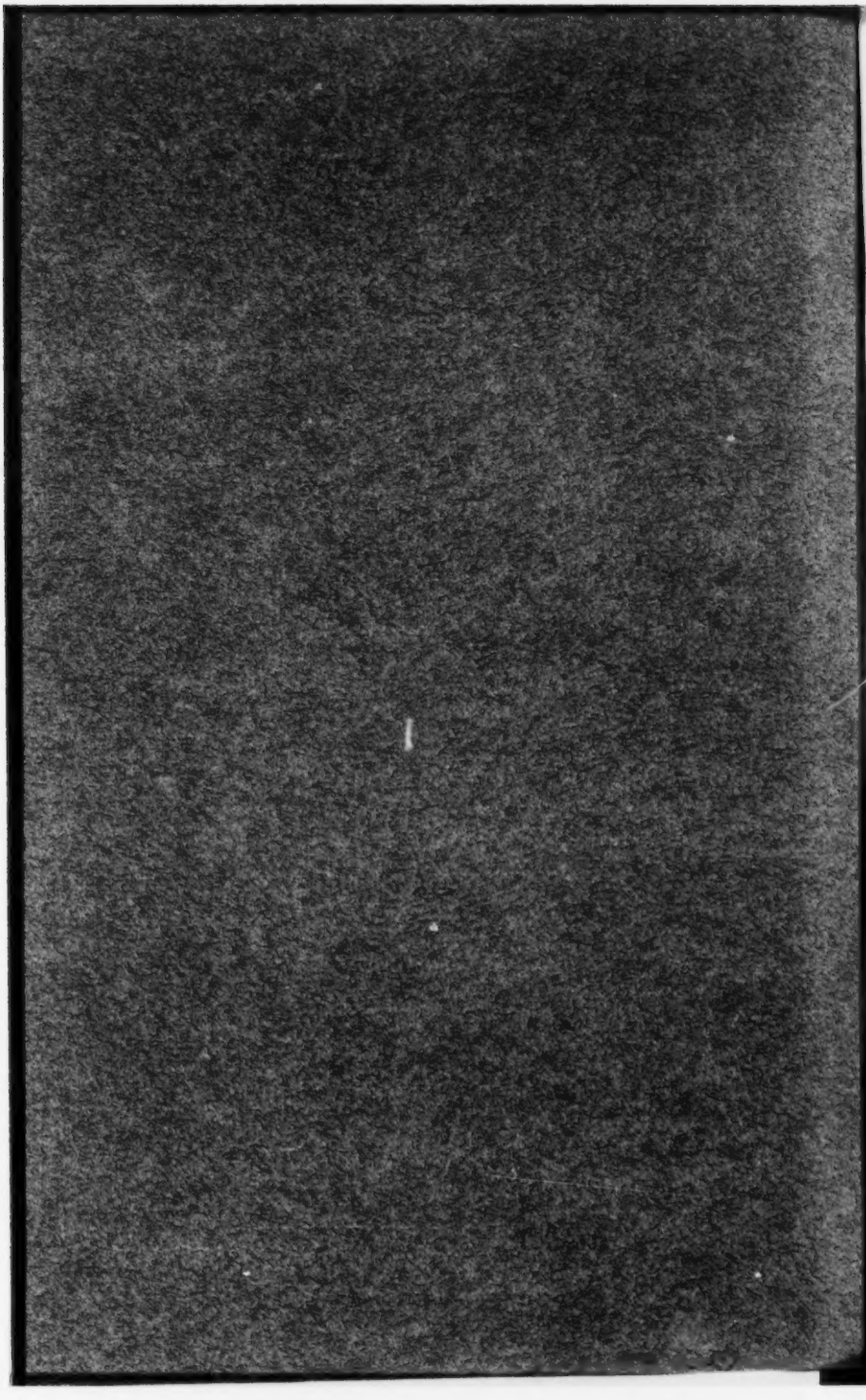

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200436—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 165

THE BORIN CORPORATION, FORMERLY ZERO ICE CORPORATION, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 22–32) is reported in 39 B. T. A. 712. The opinion of the Circuit Court of Appeals (R. 96–101) is reported in 117 F. (2d) 917.

JURISDICTION

The judgment of the court below was entered on February 14, 1941 (R. 95). A petition for rehearing filed by petitioner on March 13, 1941

(R. 103–111) was denied on March 14, 1941 (R. 113). The petition for a writ of certiorari was filed June 14, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the cost of petitioner's dry-ice plant, for purposes of computing depreciation and gain or loss on its sale, is the cost of such plant as fixed under the original contract of purchase of October 10, 1930, or as fixed in a new contract entered into on November 7, 1932.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra,* pp. 10–12.

STATEMENT

The facts as found by the Board of Tax Appeals (R. 22–28) may be summarized as follows:

Petitioner, formerly named Zero Ice Corporation, is a Michigan corporation which was organized November 5, 1930. Upon its incorporation it took over a contract which its organizers had entered into with the York Ice Machinery Corporation for the sale by York to the organizers of a 10-ton solid carbon dioxide plant for use in the manufacture of solid carbon dioxide gas, commonly known as dry ice. (R. 22–23.)

Under the terms of the contract York agreed to install the machinery and equipment in a building to be erected by the purchaser, and guaranteed that the plant would be capable of manufacturing 10 tons of dry ice per 24 hours when properly and continuously operated. York further guaranteed the workmanship and materials for one year after the machinery was put into operation, except for ordinary wear and tear and injuries due to incompetency and carelessness. The purchaser agreed to pay $146,800 for the machinery in question, $12,000 thereof as a down payment and the balance on the due dates of nine interest-bearing notes having maturities between June 15, 1931, and October 15, 1932. (R. 23.)

The contract provided that York should be liable for only direct legal damages and not for consequential damages arising out of any breach of warranty under the contract. It further provided that failure of the purchaser to notify York within 30 days of delivery that the machinery and materials did not fulfill the terms and requirements of the contract would be considered an acknowledgment that the machinery and materials were satisfactory and would constitute a complete acceptance thereof. (R. 24.)

The plant was delivered and installed in May 1931. It was operated intermittently during that month and part of June, and on the basis of its performance, which seemed to be satisfactory, was

accepted by the taxpayer. When the demand for dry ice became constant enough to require continuous operation of the plant, however, it was found that dry ice of the quality and quantity desired could not be produced. During the summer of 1931 petitioner made many complaints to York that the operation of the plant was unsatisfactory. As a consequence, York sent engineers into the plant from time to time and with their assistance it was operated throughout the summer, but production was still not satisfactory. (R. 24–25.)

In March 1932 an arrangement was made under which York agreed to operate the plant at its own expense until such time as it could demonstrate that the plant would produce dry ice in conformity with the guaranties set forth in the contract, and the petitioner agreed to pay one cent per pound for the dry ice produced during the period of York's operation (R. 25).

York operated the plant under this arrangement throughout the summer season of 1932, after which time petitioner was satisfied that the plant would produce 10 tons of dry ice per day of the proper quality, and therefore resumed its operation (R. 25, 97).

This was the first solid carbon dioxide plant designed and manufactured by York, which was the reason for its unusual cooperation during the adjustment period. In addition, the three Borin

brothers, who owned most of petitioner's stock, had been very good customers of York during the 10 years preceding 1932, having purchased water ice-manufacturing equipment worth several hundred thousand dollars and having used York equipment exclusively in six separate water ice plants. Also, petitioner's general manager, who was a former sales representative of York, had assisted in laying out the six water ice plants and had negotiated the sale to petitioner of the dry ice plant here involved. (R. 25–26.)

Because of the unsatisfactory operation of the plant petitioner had refused to pay any more than the initial down payment of $12,000, and on December 31, 1931, by proper entries on its books, it charged back to York both the unpaid notes amounting to $134,800, and the $12,000 cash down payment. Companion entries to the machinery and equipment accounts were also made. In addition, petitioner debited York in the amount of $21,954.61 as the amount of operating losses sustained from the time the plant was installed to the date of entry. Subsequently, an additional charge of $6,555.13 was made, representing operating losses from January 1, 1932, to February 29, 1932. (R. 26.)

In 1932 petitioner and York negotiated with respect to the adjustments to be made in the purchase price of the plant because of its unsatisfactory

initial operation, and arrived at an adjustment of $84,800 computed as follows (R. 26–27):

Interest on investment of Zero Ice Corporation in building and equipment of $84,882.31 for an average of 1½ years, at 9% of total		$7,639.40
Interest on advances to York Ice Machinery Co. to September 1, 1932		1,390.77
Additional interest for one month to October 1932		69.30
Normal depreciation of plant in controversy to average of 1½ years at 15% per annum of 22½% of $146,800		33,030.00
Extraordinary additional defalcation on boilers, double pipe equipment and compressors		4,000.00
Net loss to October 1, 1932 (accepted for convenience as date of settlement):		
Amounts charged on books of the Zero Ice Corporation:		
To December 31, 1931	$22,054.61	
To February 29, 1932	6,555.13	
Net loss from March 1, 1932, to October 1, 1932, and unallocated element of damages arbitrarily agreed to compensate for lost profits in order to make even amount of $84,800	10,060.79	
		38,670.53
Total amount agreed upon as damages and set off against balance of liability of $134,800		84,800.00

While it was first contemplated that this amount would be allowed as a credit against petitioner's liability under the original contract, it was subsequently agreed that a new contract be executed which provided expressly that the original agreement of October 10, 1930, "is hereby rescinded, and the rights of the parties under the said contract or arising out of the same are hereby mutually cancelled." Under the terms of the new contract, York agreed to sell the carbon dioxide plant for $72,467, which was composed of $62,000, the difference between the $84,800 allowance and the original contract price of $146,800, plus

$10,467, representing the repayment of a $10,000 loan previously made by York to petitioner and $467 interest thereon. The $12,000 previously paid by petitioner was treated as the cash payment required on the execution of the new contract, under which the plant was to remain the property of York until the entire purchase price was paid. (R. 27–28, 98–99.)

In computing its depreciation deduction on the plant for the years 1933 and 1934 petitioner used as its basis the sum of $146,800, the purchase price recited in the rescinded contract of October 30, 1930. When the plant was sold in 1934, petitioner used the same basis in computing profit thereon. (R. 28.)

In its original return for 1932, petitioner reported no income with respect to any of the adjustments made in that year between it and York in the matter of the purchase price of the plant. On February 26, 1935, however, it filed an amended return for 1932 and reported therein the receipt of additional income in the sum of $57,482.44, designated as profit realized on the execution of the contract of November 7, 1932, and paid the resulting tax and interest thereon. (R. 28.)

The Commissioner of Internal Revenue computed petitioner's depreciation allowance on a cost basis of $62,000, representing the total sum of $72,467 recited in the contract of November 7, 1932, minus the $10,000 loan and $467 interest.

(R. 28.) Petitioner's profit on the sale of the plant in 1934 was computed on the same basis (R. 28). The Board of Tax Appeals sustained the Commissioner's determination (R. 22–33) and the Circuit Court of Appeals affirmed (R. 95–101).

ARGUMENT

This case presents no conflict with any decision of this Court or of any other circuit court of appeals and involves no question of general importance. Further, the decision below is plainly correct.

The single question presented is whether, for income tax purposes, the cost of petitioner's dry-ice plant is the purchase price provided in the rescinded and abrogated contract of October 10, 1930, or is that contained in the subsequent contract of November 7, 1932, by which the parties rescinded the earlier agreement and the terms of which they actually carried out.

Petitioner is in error in its assertion (Pet. 8–9) that the court below refused to accept the Board's findings of fact. The Board found that the cost to petitioner was the price established by the 1932 contract, and the Circuit Court of Appeals held, in conformity with the well-established rule that a finding of fact by the Board is conclusive on appeal if supported by substantial evidence, that "The conclusion drawn by the Board is supported by the record" (R. 100). It accordingly affirmed the Board's decision.

Petitioner is also in error in its assertion (Pet. 6) that the court below erroneously applied the parol evidence rule. The court specifically stated that "In a controversy between the Commissioner and the petitioner, the petitioner may go behind the written contract and introduce parol evidence in contradiction of the express statements of the instrument. *Commissioner* v. *H. F. Neighbors Realty Co.*, 81 Fed. (2d) 173 (C. C. A. 6)" (R. 99). It then continued, "However, upon the testimony adduced, we think that the decision of the Board must be affirmed. While the evidential facts are not in controversy, more than one finding of fact may be deduced from the evidential facts, and the findings of the Board are binding upon this court if supported by the record" (*id*).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1941.